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## Someone Must Be Lying

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## Someone Must Be Lying

BY STEPHEN A. SALTZBURG

Is it permissible for prosecutors to argue in closing to a jury that in order to find a defendant not guilty, the jury would have to find that police officers lied? The answer is sometimes “yes” and sometimes “no.” The fact that there is no rule that governs all cases means that prosecutors must take care before arguing to the jury that someone must be lying. It also means that defense counsel must be prepared to object to improper argument.

### The Easy Case

It is not difficult to imagine a case in which the prosecutor may argue that it is necessary to find that a police officer lied in order to find the defendant not guilty. Suppose, for instance, the defendant is charged with being a felon in possession of a firearm, the officer who arrested the defendant testifies to searching the defendant and finding a pistol in the defendant’s jacket, and the defendant testifies that the officer “planted” the pistol during the arrest. In this case, the only question is who is telling the truth. Either the officer or the defendant must be, and there is little, if any, possibility that the two simply had different, but equally honest, perceptions of how the gun came to be found on the defendant. In such a case, the prosecutor would be arguing that the jury should believe the officer; defense counsel would be arguing that the jury should believe the defendant; and the jury would understand that one of the two percipient witnesses was lying.

Other cases are not so straightforward. An example is *United States v. Ruiz*, 710 F.3d 1077 (9th Cir. 2013).

### The Facts of Ruiz

Two sisters saw a man walking down the street in their residential neighborhood, holding a shotgun and mumbling. One called 911; five minutes later a police helicopter responded, and Officer Peck in the helicopter saw from 300 to 500 feet in the air a man

run around the back of a house and throw a shoebox sized item over a fence into a vacant lot. Officer Porch arrived at the scene, searched the vacant lot, and found a shoe box with eight to 12 shotgun shells. Officer Verbanic arrived at the house as Raymond Ruiz Jr. was trying to enter through the back door. Officer Verbanic ordered Ruiz to get on the ground and noticed a shotgun about an arm’s length from Ruiz. The ammunition found in the shoebox matched the 12-gauge shotgun. The sisters both identified the man they had seen with the shotgun as Ruiz.

After Ruiz was arrested, Officer Ludikhuizen took him to a squad car, where Ruiz waived his *Miranda* rights. Officer Ludikhuizen testified at trial that Ruiz told him that the shotgun belonged to his father and that he had been trying to hide it when the police arrived. Ruiz testified at trial and denied making the statement. Ruiz was convicted of being a felon in possession of a firearm and ammunition.

### The Prosecutor’s Closing Argument

The court of appeals described the prosecutor’s closing argument as follows:

To highlight parts of his closing argument, the prosecutor utilized a PowerPoint slide presentation consisting of pictures of the alleged crime scene, photographs of the witnesses who testified at trial, summaries of the testimony presented, and visual representations of the jury instructions, and of the government’s key arguments. Following a slide depicting the first element of the offense—“the defendant knowingly possessed the firearm or ammunition”—were three slides depicting alternative “way[s] to find defendant guilty.” The slides stated that the jurors could find Ruiz not guilty “only” if they found that Officers Peck and Ludikhuizen “lied to you” and that the Fuentes sisters were mistaken. The court overruled Ruiz’s objection to the slides.

(*Id.* at 1082 (alteration in original).)

The defense objection was directed to the argument that to find Ruiz not guilty the jury would have to conclude that Officers Peck and Ludikhuizen lied. The court summed up the defense argument as follows:

At the heart of Ruiz’s argument is his contention that the prosecutor’s statements presented the jury with a false choice between his and the officers’ accounts, since the officers could have testified honestly, but nonetheless mistakenly perceived the events on the night in question.



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This false choice, he asserts, improperly shifted the burden of proof to the defense.  
(*Id.*)

### Fair Argument

The court quoted from several prior cases to highlight when the argument about credibility of law enforcement officers is permissible:

As we have previously explained, “credibility is a matter to be decided by the jury.” *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999). To that end, “prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying.” *Id.* (citation and internal quotation marks omitted). “It is also true, however, that the prosecution must have reasonable latitude to fashion closing arguments. Inherent in this latitude is the freedom to argue reasonable inferences based on the evidence. In a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and hence to argue, that one of the two sides is lying.” *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991) (citing *United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988) (holding that the prosecutor’s statement that defendant was a liar could be construed as a comment on the evidence) and *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984) (“It is neither unusual nor improper for a prosecutor to voice doubt about the veracity of a defendant . . .”)); see also *United States v. Wilkes*, 662 F.3d 524, 539–42 (9th Cir. 2011) (same); *United States v. Tucker*, 641 F.3d 1110, 1120–21 (9th Cir. 2011) (“Prosecutors can argue reasonable inferences based on the record, and have considerable leeway to strike hard blows based on the evidence and all reasonable inferences from the evidence. A prosecutor may express doubt about the veracity of a witness’s testimony [and] may even go so far as to label a defendant’s testimony a fabrication.” (alteration in original) (internal quotation marks and citations omitted)).  
(*Ruiz*, 710 F.3d at 1082–83 (footnote omitted).)

### United States v. Wilkes

The court cited *Wilkes* and explained why in that case it rejected the defendant’s argument that the prosecutor engaged in improper burden shifting in arguing that the defendant’s testimony was a “preposterous charade” and that “each [government witness], if you think about their testimony and what they told you, you either have to believe all

of those people or you believe Brent Wilkes. That’s the choice before you. You can’t believe both.” (662 F.3d at 541 (alteration in original).)

The court explained that it rejected the defendant’s argument because the case came down to which of two conflicting stories was true and, therefore, the prosecutor’s argument was a permissible inference from the evidence. The court added that the prosecutor made his argument after explaining at length to the jury what the government was required to prove in order for the jury to find Wilkes guilty.

### United States v. Tucker

The court also offered *Tucker* as an example of permissible argument. *Tucker*, however, addressed prosecutor argument concerning the improbability that a defense theory of the case was credible rather than a comparison of government and defense witnesses. The *Tucker* court summarized a portion of the prosecutor’s closing argument as follows:

The prosecutor, in her closing argument, also commented on what the jury would have to find or believe, in order to convict Tucker. The prosecutor said she wanted “to point out a couple of things that you as jurors are going to have to find to be true if you decide that the defendant is not guilty. Because for you to say that he’s not guilty, these are the things that you have to believe. . . .” The prosecutor went on to list various aspects of the defense theory of the case that the jury would “have to believe,” and stated “[y]ou will have to believe that and that is not logical. It’s not reasonable.”  
(641 F.3d at 1115 (alteration in original).)

The court observed that after defense counsel unsuccessfully objected that the standard of proof was being shifted to the defense, the prosecutor made the following argument:

To find the defendant not guilty, remember, you have to have some kind of reasonable doubt. And the key word there is “reasonable”. . . . If you are gonna find him not guilty, you also have to believe that [lists various points of the defense argument]. . . . You will have to believe that. Because if you do not, that means that that [sic] the personal property in that master bedroom was the defendant’s. It means it was his bedroom. It means that it was his shotgun. It means that he is guilty. You would also have to believe that the defendant did not lie. And do you believe that? . . .

Again, if you're going to have a doubt it must be reasonable; it must be based on reason. (*Id.* (alteration in original).)

The *Ruiz* opinion noted that the *Tucker* court found that the prosecutor's argument was "inartful," but that it was permissible because it simply communicated that the jury would have to believe implausible aspects of the defendant's testimony in order to believe that the defense theory was credible. (*Ruiz*, 710 F.3d at 1083–84.)

### Back to Ruiz

In *Ruiz*, the court concluded that "the prosecutor's argument came very close to altering the burden of proof." (*Id.* at 1084.) The court distinguished between comparing (1) Officer Ludikhuizen's testimony to that of the defendant, and (2) Officer Peck's testimony to that of the defendant.

The court recognized that "Ruiz's testimony was squarely at odds with Officer Ludikhuizen's testimony in one key respect—namely, Ruiz denied confessing to Ludikhuizen that he was attempting to hide the shotgun when police arrived." (*Id.*) Although the court did not say so explicitly, it appears that *Wilkes* would strongly support the conclusion that it would have been permissible for the prosecutor to argue that either the defendant or the officer must be lying about whether the defendant admitted that he was attempting to hide the shotgun. Not only is this a rational argument based on the evidence, but it also is an inevitable one. There is no other way to explain the difference in testimony.

The prosecutor's suggestion that either Officer Peck or the defendant must be lying was neither inevitable nor correct, as the court explained:

[Ruiz's] testimony vis-a-vis Officer Peck's observation of an item thrown over the fence into the adjoining vacant lot was somewhat more equivocal. Ruiz testified that, upon observing Peck's spotlight trained on his grandmother[s] house, he attempted to hide because he was drinking beers with his father in violation of his parole. To this end, he ran around the side of the house, where he stated that he may have thrown his beer bottle into the backyard adjoining the fence and vacant lot, but could not recall with certainty how he disposed of the beer bottle. Although Ruiz also testified that he did not throw "anything" over the fence, including the "panel" or shoe box-sized item that Peck observed, Peck could have mistaken the size and shape of the item thrown from his vantage point nearly two football fields above the scene.

As the foregoing suggests, the prosecutor's argument that either Peck or Ruiz must be lying could well be construed as arguing an inference unsupported by the evidence, and thereby altering the burden of proof. (*Id.*)

The point the court made was that it was possible for Ruiz and Officer Peck both to be telling the truth, which meant that the situation was very different from the comparison of Officer Ludikhuizen's and the defendant's testimony.

### The Concern

The concern that arises when prosecutors argue that someone must be lying is that the burden of persuasion is subtly shifted, and that courts must be careful to ensure that jurors are not misled as to what the government must prove. To be clear, when a prosecutor argues that for a defendant to be found not guilty the jury must believe that police officers lied, the jury may be misled into thinking that if it finds that the police officers were truthful then they must convict the defendant. This is misleading because honest police officers may be mistaken, and even honest police officers who are not mistaken may not have presented sufficient evidence to meet the beyond a reasonable doubt standard.

Similarly, when a prosecutor argues that either police officers or the defendant must be lying, the jury may be misled into believing that its task is simply to decide who is truthful and that this one decision will be case determinative. It may well be true in cases like *Wilkes*. It is certainly true that the jury in *Ruiz* inevitably had to decide whether to believe Officer Ludikhuizen or Ruiz. If the jury believed the officer, it probably would not matter very much whether the jury also believed Officer Peck, since Officer Ludikhuizen's testimony established that Ruiz was in possession of a firearm. Whether or not he also possessed the ammunition that Officer Porch found in the shoe box would not have mattered, and thus Officer Peck's testimony would also have been of little importance, even if discredited.

### The Decision

The court of appeals ultimately did not decide whether the prosecutor committed error in the closing argument. Instead, it concluded that any error was harmless given the substantial evidence adduced by the government.

### Lessons

1. The *Ruiz* court relied in part on the fact that before making the argument that someone must be lying, the prosecutor gave a lengthy explanation to the jury of the elements that the government was

required to prove and reminded the jury of the government's burden of proof. Prosecutors may reduce the likelihood that an argument that crosses the line will be found prejudicial if they take pains to be clear to the jury what they must prove and the burden of proof they must meet.

2. It is important for prosecutors to consider before making an argument that either law enforcement officers or the defendant must be lying whether such an argument is applicable to all law enforcement officers involved in the case or only some. *Ruiz* highlights the importance of such consideration.

An argument that either Officer Ludikhuize or Ruiz must be lying likely would have withstood a challenge, whereas an argument that either Officer Peck or Ruiz must be lying likely would not have.

3. Defense counsel have the burden of objecting when prosecutors improperly make the "somebody must be lying" argument. The objection takes on force when defense counsel is able to explain to the trial judge how the argument may impermissibly mislead the jury as to what it must believe to convict the defendant. ■